103

(1)

Supreme Court, U.S.
FILED

08-278 AUG 28 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No. _____

IN THE

Supreme Court of the United States

INCOR, SHELTERED WORK ACTIVITY PROGRAM, INC., ET AL.,

Petitioners,

vs.

KENT W. FOWLER, ET. AL., INDIVIDUALLY AND STANDING IN THE STEAD OF OTHER PERSONS SIMILARLY SITUATED

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Adam Scott Weintraub
Counsel of Record
Terry S. O'Donnell
Savage, O'Donnell, Affeldt,
Weintraub & Johnson
110 W. 7th Street, Suite 1010
Tulsa, OK 74119
(918) 599-8400
Attorneys for Petitioners

ISSUE PRESENTED FOR REVIEW

Whether in determining the definition of a "private home" under the companionship services exemption to the Fair Labor Standards Act ("FLSA") the United States Court of Appeals for the Tenth Circuit has created an incomprehensible standard by applying factors in a way that disparately discriminates against the most severely developmentally disabled individuals in violation of the spirit and purpose of the Americans with Disabilities Act and frustrates the United States Supreme Court's decision in *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339 (2007).

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners INCOR, Sheltered Work Activity Program, Inc., d/b/a INCOR, Edward Breen and Betsy Breen were defendants in the district court and appellees in the court of appeals.

Respondents are the following 33 individuals and standing in the stead of other persons similarly situated were plaintiffs in the district court and appellants in the court of appeals:

Kent W. Fowler
Cody Fowler
Larry Burris
Michael Leach
Frances Woods
Roseola Thornburg
Katherine Carroll
Bettie Burnett
Lisa Smith
Alice Smith
Lesa Horney
Christine Lane-Huckabay
Kenya Washington
Yolanda White
Angela McVay
Wakeetha Atkeson
Angie Miller
Ruby McGee
Carmen Kirkland
Anntonett Taylor
Deloris Wilson

Tia Sallis
Sherry Sallis
Bruce McCarthy
Nicole Pierce
CynthiaWhitefield
Joretta Truitt
Judy Blackmer
Lajoya Davis
Leceif Spring
Misty Graham
Sonya July
Stephanie Newman

CORPORATE DISCLOSURE STATEMENT

Petitioner Sheltered Work Activity Program, Inc., d/b/a Incor, has no parent company, and there are no publicly held companies that hold any stock of Sheltered Work Activity Program, Inc.

TABLE OF CONTENTS

PAGE

ISSUE PRESENTED FOR REVIEW i

LIST OF PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE STATEMENT iv

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

I. The Legislative History Behind The Companionship Services Exemption 6

II. Importance of the Companionship Exemption of the FLSA to the home health care industry as a whole. 9

III. Legal Requirements for Utilization of the Companionship Services Exemption 11

IV. The "private home" factors identified by the Tenth Circuit Court of Appeals and their discriminatory impact on the severely developmentally disabled 12

REASONS FOR GRANTING THE PETITION 18

1) The United States Court of Appeals for the Tenth Circuit has decided a question of extreme public importance under the Fair Labor Standards Act which has not been, but should be, settled by this Court. 18

2) The United States Court of Appeals for the Tenth Circuit has entered a decision that conflicts with the spirit and objective of the Americans with Disabilities Act and disproportionately discriminates against the most severely developmentally disabled 20

3) The United States Court of Appeals for the Tenth Circuit has interpreted a federal regulation in a way that frustrates the purpose of relevant decisions of the United States Supreme Court 30

CONCLUSION 32

APPENDIX

APPENDIX A A1-A54
ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX B B1-B190
JUDGMENT AND FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

APPENDIX C C1-C2
ORDER DENYING PETITION FOR REHEARING UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX D D1-D8
AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. § 12101, §§ 12131-12134

TABLE OF AUTHORITIES

Cases: PAGE

Bowler v. Deseret Village Ass'n, Inc.,
922 P.2d 8 (Utah 1996) 13

Homeward Bound, Inc. v. Hissom Mem'l Ctr.,
No. 85-C-437-E, 1987 WL 27104
(N.D. Okla. July 24, 1987) 5 n.1

Long Island Care at Home, Limited v. Coke,
127 S. Ct. 2339 (2007) 4, 6, 8, 30

McCune v. Oregon Senior Services Division,
894 F.2d 1107 (1990) 9

Olmstead v. L.C., 527 U.S. 581,
119 S. Ct. 2176, 144 L.Ed. 2d 540 (1999) . 17, 22, 28

Rice v. Sioux City Memorial Park Cemetery, Inc.,
349 U.S. 70 (1955) 31

Welding v. Bios,
353 F.3d 1214 (10th Cir. 2004) 13-16, 23-28, 29

Statutes, Rules and Regulations:

28 U.S.C. § 1254(1) 1

29 U.S.C. § 213(a)(15) 2, 6, 7, 8

42 U.S.C. § 12101 ..... 3, 20-22, App. D1-D4

29 C.F.R. § 552.3 ..... 2, 11-12, 18

29 C.F.R. § 552.6 ..... 3, 7, 12

29 C.F.R. § 552.109(a) 3, 30, 31

Petitioners Incor, Sheltered Work Activity Program, Inc., an Oklahoma Corporation, d/b/a Incor, Edward Breen and Betsy Breen ("Petitioners") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is not reported in a federal reporter, however, it is cited at 2008 WL 2019598 (10th Cir. (Okla.)), 155 Lab. Cas. P 35,431, 13 Wage & Hour Cas. 2d (BNA) 1111. The court of appeal's Order and Judgment is reprinted in App. A at A1-A54. The district court's opinion is unreported. The district court's Judgment and Findings of Fact and Conclusions of Law supporting the Judgment are reprinted in App. B at B1-B190.

JURISDICTION

The court of appeals entered judgment on May 12, 2008. A petition for rehearing with suggestion for rehearing *en banc* was denied on June 3, 2008 and is reproduced in App. C at C1-C2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. In pertinent part, section 13(a)(15) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 213(a)(15) ("§ 213(a)(15)") provides:

> (a) Minimum wage and maximum hour requirements
>
> The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to--
>
> (15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.

2. In pertinent part, 29 C.F.R. § 552.3 provides:

> Domestic service employment.
>
> As used in section 13(a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed.

3. In pertinent part, 29 C.F.R. § 552.6 provides:

   Companionship services for the aged or infirm.

   As used in section 13(a)(15) of the Act, the term *companionship services* shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or infirmity, cannot care for his or her own needs.

4. In pertinent part, 29 C.F.R. § 552.109(a) provides:

   Third party employment

   (a) Employees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15).

5. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, §§ 12131-12134 reprinted in Appendix D at D1-D8.

STATEMENT OF THE CASE

This case concerns whether in determining the definition of a "private home" under the companionship services exemption to the Fair Labor Standards Act ("FLSA") the United States Court of Appeals for the Tenth Circuit has created an incomprehensible standard by applying factors in a way that disparately discriminates against the most severely developmentally disabled individuals in violation of the spirit and purpose of the Americans with Disabilities Act and frustrates the United States Supreme Court's decision in *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339 (2007).

Petitioners (collectively "Incor") are a non-profit provider of services to developmentally disabled individuals (people with an I.Q. of less than 75, collectively "clients") in northeastern Oklahoma, which includes providing in-home habilitation services. The clients, most of whom have both severe physical and developmental disabilities, and/or their guardians hire Incor to provide a range of in-home services for the clients which allows them to live in their own homes and avoid institutionalization. Incor's residential program is regulated by and funded through the Oklahoma Department of Human Services, Developmental Disabilities Services Division ("DDSD"). Approximately 98% of the funding for the residential program is provided by state and federal funding through the state of Oklahoma. The DDSD is charged with ensuring that the

developmentally disabled receive quality care from their service providers. The DDSD accomplishes this goal by entering into contracts with different service providers. These contracts set out requirements that must be met before the provider will be reimbursed for services provided to the developmentally disabled. The DDSD contract requirements are enforced through state employed Case Managers. The provision of these in-home services was initiated following litigation to deinstitutionalize individuals with developmental disabilities.[1]

In order to provide in-home services, Incor employs Habilitation Training Specialists ("HTS") and/or House Managers to provide care to its clients. Pursuant to the DDSD contract with service providers, HTS hours are reimbursed to the service providers at a flat rate, regardless of whether the individual HTS worked over forty

---

[1] In *Homeward Bound, Inc. v. Hissom Mem'l Ctr.*, No. 85-C-437-E, 1987 WL 27104 (N.D. Okla. July 24, 1987) the United States District Court for the Northern District of Oklahoma ordered deinstitutionalization of patients in Hissom by placing them in the least restrictive environment suitable for their needs. The goal of the court's order was to allow the former patient to live in their own home in the community while ensuring quality care through adequate safeguards. In the *Homeward Bound* decision, the court discussed the hallmarks of institutionalization including: inadequate medical care; harmful and unsanitary environmental conditions; subjection to abuse by staff and other patients; deprivation of privacy; not being provided adequate programming; and an overall deprivation of basic human rights. *Id.* at *10-14.

hours that particular week. Respondents brought the underlying suit against Incor in the United States District Court, Eastern District of Oklahoma, claiming entitlement to back overtime wages flowing from an alleged misapplication of the "Companionship Services" exemption to the overtime provisions of the FLSA § 213(a)(15).

Prior to trial, the district court entered summary judgment for Incor on a variety of legal issues. Thereafter, the district court conducted a bench trial from December 6 – 10, 2004, from which the district court made Findings of Fact and Conclusions of Law (App. B at B1-B190), and entered judgment in favor of Incor and against Respondents on all of their claims. Subsequently, Respondents' appealed the district court's decision to the United States Court of Appeals for the Tenth Circuit which rendered its Order and Judgment on May 12, 2008 (App. A at A1-A54), reversing and remanding the case back to the district court, with the exception of upholding the district court's application of a two-year statute of limitations with respect to Respondents' wage claims.

I) The Legislative History Behind the Companionship Services Exemption

The "Companionship Services" exemption cannot be viewed in a vacuum, and must be viewed in light of its legislative history and intent. *See, e.g., Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. at 2344. In 1974, Congress enacted legislation which extended the coverage of the

FLSA to include domestic workers. Prior to that time, the FLSA excluded such workers on the ideological grounds that the private home and the work place were separate, and that an individual's home was a "special" place with its control vested in the household's family. However, when extending the FLSA's coverage to domestic employees in 1974, Congress carved out a narrow exception to the domestic service coverage for employees who provide "Companionship Services" to individuals who, because of age or disability, are unable to care for themselves.

The pertinent codes and regulations state as follows: 29 U.S.C. § 213(a)(15) providing that "employee," for the purposes of the act shall not apply to "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined by regulations of the Secretary)." "Companionship services," are defined in 29 C.F.R. § 552.6, as:

> Those services which provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirmed person such as meal preparation, bed making, washing of clothes, or other similar services.

> They may also include the performance of general household work: Provided, however, that such work is incidental, i.e., does not exceed 20% of the total weekly hours worked. The term "companionship services" does not include services related to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse.

By enacting 29 U.S.C. § 213(a)(15), Congress redrew the legal boundary between the public work place and work done within the home itself, exempting a core of personal services excluded from regulation under the FLSA.

Most recently in June of 2007, this Court in *Long Island Care At Home, Ltd. v. Coke,* 127 S.Ct. 2339, upheld the United States Department of Labor's interpretation extending the "Companionship Services" exemption to individuals employed by a third party employer other than the family or household using their services. Although this Court's decision in *Coke* turns on whether the Department of Labor's interpretation of its own regulations was "controlling," this Court clearly had the opportunity to curtail the application of the "Companionship Services" exemption to only those individuals employed directly by the family or household in which they provided services. More importantly, by upholding the extension of the "Companionship Services" exemption to third party

employers, this Court has definitively expanded the application of the exemption and allowed in-home services to reach a much greater population of aged and infirm that otherwise would not be able to afford such in-home services. In discussing the policy reasons for the "Companionship Services" exemption, the Ninth Circuit Court of Appeals has stated, "[w]e are informed that those critical services reach more elderly or infirm individuals than they otherwise would precisely because the care providers are exempt from the FLSA." *McCune v. Oregon Senior Serv. Div.*, 894 F.2d 1107, 1110 (1990). Thus, as a result of the "Companionship Services" exemption, a greater number of older and disabled Americans will be able to remain in their homes as opposed to requiring institutionalization.

II) **Importance of the Companionship Exemption of the FLSA to the home health care industry as a whole.**

The 1974 amendment to the FLSA that established the "Companionship Services" exemption is unique in that Congress offered protection to a class of consumers rather than employees. The main purpose of the exemption is to provide cost protection to the elderly and infirm who require companionship services to remain in their communities and their own homes. The availability of the "Companionship Services" exemption is critical to the health care industry and third party employers in particular. The use of the exemption has two overwhelming advantages,

1) a significant savings to the aged or infirm with regard to costs, and 2) more consistent training and care to the service recipient.

Most funding for home care services comes from the federal and state programs. Under these programs, compensation for hands-on care providers is set at a flat rate per hour. Thus, the employers of care providers have little or no control over the cost of services and can only act to affect the costs of care. As a result, the cost increases due to the service provider's inability to use the "Companionship Services" exemption have lead the service providers to control costs through such steps as eliminating overtime work (thereby increasing the number of different care providers in the home of the aged or infirm), reducing base compensation rates to minimum wage, and dropping employee benefit programs. Consequently, the employees also suffer because they will be subject to capped compensation and limited benefits with no alternative but to find supplemental income through second jobs.

Equally important, the aged and infirm will suffer if the service providers are unable to utilize the "Companionship Services" exemption. The service provider's will be required to limit the hours of work for the HTS's which will disrupt continuity of care as multiple caregivers will be assigned to an individual to avoid overtime compensation. Whether providing services to the aged or infirm, fewer caregivers produce better and more consistent care to the recipients. Clearly in serving the aged and infirm, there are always barriers and

challenges to developing a trusting relationship between the caregivers and the care recipients. Resistance by the aged or infirm to breaking down those barriers often leads to setbacks in the way of "behaviors" or negative training. Thus, the fewer caregivers involved in the lives of the care recipients leads to more trusting relationships and better care for the aged and infirm.

III) Legal Requirements for Utilization of the Companionship Services Exemption

In order to utilize the "Companionship Services" exemption, the employer must show that two principle requirements have been met. First, the employee must have provided domestic services in a "private home"; and second, the employee must have provided "Companionship Services" (i.e. services related to the "protection, care, and fellowship" of the aged or infirm). The United States Department of Labor, has enacted regulations encompassing the "private home" requirement in defining "Companionship Services." According to 29 C.F.R. § 552.3, the services must be provided in or about a private home, more specifically:

> . . . Services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters,

> butlers, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use . . ." *Id.* (emphasis added)

Correspondingly, 29 C.F.R. § 552.6 defines "Companionship Services" as:

> . . . Those services which provide **fellowship, care and protection** for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services include household work related to the care of the aged or infirmed person, such as meal preparation, bed making, washing of clothes and other similar services . . . (emphasis added)

Thus, there are two key requirements under the regulation for utilizing the Companionship Services exemption: 1) the services relate to the "**fellowship, care and protection**" of the client and 2) the services must be provided in a "**private home.**"

IV) The "private home" factors identified by the Tenth Circuit Court of Appeals and their discriminatory impact on the severely developmentally disabled.

Assuming the services provided relate to the "fellowship, care and protection" of the elderly or infirm, the court of appeals has provided guidance regarding the criteria to be considered when attempting to determine whether a home is "private" for purposes of utilizing the "Companionship Services" exemption. In *Welding v. Bios*, 353 F.3d 1214 (10th Cir. 2004), the Tenth Circuit Court of Appeals adopted two "key inquiries" and a six factor test to analyze whether any residence is truly a "private home" for purposes of the "Companionship Services" exemption.

Specifically in *Welding*, the court of appeals adopted the approach of analyzing the "private home" status of the residences occupied by the developmentally disabled along a continuum. The court of appeals states in pertinent part:

> Whether Bios is exempt from paying overtime to any of the plaintiffs here depends on whether any of the residences in which the Plaintiffs provided services to the developmentally disabled individuals should be considered "private homes" as that term is used in the regulations. "[T]he definition of a 'private home' exists along a continuum." *Bowler v. Deseret Village Ass'n, Inc.*, 922 P.2d 8, 13 (Utah 1996). At one end of the continuum is "[a] traditional family home in which a single family resides," which clearly

> constitutes a private home. *Id.* At the other end of the continuum is "an institution primarily engaged in the care of the sick, the aged, the mentally ill or a boarding house used for business or commercial purposes," which clearly do not constitute private homes. *Id.* (quotation omitted). In between lie a variety of living arrangements, many of which may constitutes "private homes" for purposes of the companionship services exemption. *Id.* at 1218.

Later in *Welding*, the court of appeals notes that prior to its pronouncement, the "so-called factors that Courts have considered" when determining the "private home" status of a living unit "have grown like weeds." *Id.* at 1219. Accordingly, the court of appeals adopted a six factor test to assist Courts in determining "who has ultimate management control of the living unit and whether the living unit is maintained primarily to facilitate the provision of assistive services." *Id.*

Petitioners agree that ultimate "control," or the "right to control," the home is the appropriate analysis for determining whether a residence is a "private home" or more akin to an institution for purposes of applying the "Companionship Services" exemption. However, the one-size fits all, "six factor test" to determine private home status set out by the Tenth Circuit in *Welding* is fundamentally flawed.

The six factors that the court of appeals applied in *Welding* are; 1) whether the client lived in the living unit as his or her private home before beginning to receive the services, 2) who owns the living unit, 3) who manages and maintains the residence, 4) whether the client would be allowed to live in the unit if the client were not contracting with the provider for services, 5) the relative difference in the cost/value of the services provided and the total cost of maintaining the living unit (including government subsidies), and finally 6) whether the service provider uses any part of the residence for the provider's own business purposes.[2] *Id.* at 1219-1220. Clearly, the primary issue is who controls or has the right to control the residence. However, as shown below, rigid application of the factors leads to a disparate discriminatory impact

---

[2] Although the court of appeal's decision in *Welding* identifies these six factors in determining the "private home" status of the residences in question, the *Welding* decision does not appear to make the inquiry exclusive to those six factors identified. In concluding its opinion, the court of appeals states:

> To be entitled to the companionship services exemption, Bios must establish the foregoing factors ***and any other factors that may be applicable***, when considered together, clearly and unmistakably establish that the particular living unit in question is a private home.

Id. at 1220 (emphasis added). Thus, "other factors" may be considered on a case by case basis when determining private home status under *Welding*.

on the most severely developmentally disabled home care recipients.

Despite its pronouncement in *Welding*, the court of appeals brushed aside and wholly failed to consider the district court's Findings of Fact and Conclusions of Law. (*See* App. A at A15-A16). For example, since the key inquiries are who has ultimate management control of the residence and whether the residence is maintained primarily to facilitate providing assistive services, the court of appeals should have given consideration (as did the district court (App. B at B37-B40)) to the individual Service Agreements between the client and/or their guardian and Incor. Critically, Incor provided no service not specifically requested by the client and/or guardian. The Service Agreements between the clients and Incor are terminable at will. Instead of recognizing that the Service Agreements allowed the client and his or her guardian to retain control over all aspects of their home, the court of appeals described the Service Agreements as "ancillary agreements," ignoring the fact that the services provided were specifically requested. (App. A at A16). Rather than recognize the client's retention of control through the Service Agreement, the court of appeals looked only to who the actual person was that performed the needed services for the client in order for that client to be able to live in the residence. Specifically the court of appeals cited *Welding* stating that, "[i]f many of the essentials of daily living are provided for by the client or the client's family, that weighs strongly in favor of it being a private home." (App. A at A15).

Sadly, many times there is no family member who is willing and able to provide daily care for an elderly or infirm family member. In such a situation the family or guardian of the elderly or infirm will employ a third party, by use of a Service Agreement, to ensure that their family member receives proper care. In ridiculing the evidence surrounding Incor's Service Agreements, the Tenth Circuit automatically disqualifies homes that may otherwise be "private." As a matter of course, the more disabled the client the more services the client will require, and axiomically the more services required the more this factor will lend to the residence not being a private home.

The six "private home" factors as set out in *Welding*, whether taken as a whole or in part, discriminate against the more profoundly developmentally disabled because they fail to account for the needs and requirements of caring for such an individual. Severely disabled individuals will never reside in a "private home" and in turn, may never utilize the very exemption designed to assist them in obtaining such services. In categorizing these aged or infirm individuals in this way, the Tenth Circuit is relegating the severely disabled as being perpetually categorized as institutionalized, no matter where they reside. Such perpetual institutionalization, this Supreme Court has held is discrimination. *See Olmstead v. L.C.*, 527 U.S. 581, 119 S. Ct. 2176, 144 L.Ed. 2d 540 (1999).

This seems an incomprehensible result from a regulation that's purpose is to keep individuals in

their private homes and out of institutions by providing for affordable, quality home health care.

REASONS FOR GRANTING THE PETITION

Petitioners identify three compelling reasons to grant this petition:

1) **The United States Court of Appeals for the Tenth Circuit has decided a question of extreme public importance under the Fair Labor Standards Act which has not been, but should be settled by this Court.**

This litigation presents a critical question of federal law involving exemptions to the FLSA, specifically the rights of individuals who are infirm due to physical or mental disability or age to receive the highest level of care, service, and habilitation training in the least restrictive environment. This Court's ruling on this question will impact millions of American citizens who require, or will require, companionship services. To date there is no guidance by this Court, or the Department of Labor, concerning the interpretation or clarification of what constitutes a "private home" as contemplated under the "Companionship Services" exemption to the FLSA.

By imposing myopic and pedantic requirements on what constitutes a "private home" under § 552.3, the Tenth Circuit Court of Appeal's decision in this matter very narrowly defines the

"private home" status of the individual's residence, thereby making utilization of the exemption extraordinarily risky and impractical by any employer.

This ruling will have a profoundly negative impact on the home health care sector as a whole. The ability of home health care providers to supply much needed services to millions of infirm and elderly individuals is greatly obstructed by the court of appeal's decision which applies an inconsistent definition and incomprehensible standard of what constitutes a private home.

Further, because public funding pays for the majority of the services provided to the clients in the case at hand, the court of appeal's ruling will severely affect the way in which residents of Oklahoma, and possibly many other states within the Tenth Circuit, receive important health care assistance. The court of appeal's interpretation will make these critical services unaffordable to an increasing number of American citizens seeking home-based companionship services regardless of whether it's private funding or public funding. The point of the exemption is to allow care recipients to stretch their healthcare dollars as far as possible. The court of appeals decision and application of the *Welding* factors disrupts what would in all respects be considered a private home, especially for the clients requiring the highest level of care. In combination, these consequences threaten the important public policy favoring home health care, leaving institutionalization the only option for many.

Although unpublished, the court of appeal's decision threatens to restrict the availability of in-home care to millions of aging and disabled Americans. In order to promote both the availability and continuity of "Companionship Services" to those in need, the FLSA creates a very specific exception to the overtime requirements which should not be hyper-technically defined such that the exemption may only be utilized by those fortunate enough to own their own home or live with family members that manage the individual's lives. In sum, these issues present questions of exceptional importance warranting granting this petition for writ of certiorari.

2) The United States Court of Appeals for the Tenth Circuit has entered a decision that conflicts with the spirit and objective of the Americans with Disabilities Act and disproportionately discriminates against the most severely developmentally disabled.

With the enactment of the American with Disabilities Act of 1990, 42 U.S.C. § 12101, et. seq. ("ADA"), Congress ensured that individuals with disabilities be afforded the opportunity to receive public services and programs in the most integrated setting appropriate for their needs. The court of appeals decision in this case conflicts with the spirit and purpose of the American with Disabilities Act of 1990. Even though the facts of this case may not fit exactly within one of the explicit protections provided by one of the Titles to

the ADA, the Congressional purpose and findings are relevant to this case. In enacting the ADA Congress found that:

> (1) some 43,000,000 Americans have one or more physical or mental disabilities and this number is increasing as the population as a whole is growing older;
> (2) historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
> (3) discrimination against individuals with disabilities persists in such critical areas as . . . housing, . . . institutionalization, health services . . .;
>
> * * *
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . segregation and relegation to lesser services, programs, activities, . . . or other opportunities;
>
> * * *
>
> (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subject to a history of purposeful unequal treatment...;
> (8) the Nation's proper goals regarding individuals with disabilities are to assure

> equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; . . . .

42 U.S.C. § 12101(a).

Further, this United States Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581, 119 S. Ct. 2176, 144 L.Ed. 2d 540 (1999), recognized under Title II, the public services portion of the ADA, that States are required to provide community based treatment for persons with mental disabilities when the treating professionals determine placement is appropriate. In *Olmstead*, Respondents were developmentally disabled women who were voluntarily confined for treatment in a psychiatric unit. Even after their treating professionals decided the women could continue their care in a community based program the woman remained institutionalized. The district court found that "unnecessary institutional segregation constitutes discrimination, *per se*." *Id.* at 527 U.S. 582; 119 S.Ct. at 2178. This Supreme Court agreed; "[u]njustified isolation, we hold, is properly regarded as discrimination based on disability." *Id.* at 527 U.S. 587; 119 S.Ct. 2185.

Considering Congress's purpose in passing the ADA and this Court's proclamation that unjustified institutionalization is discrimination based on disability, the *Welding* factors applied by the Tenth Circuit to determine what is a "private home" must be examined for their disparate discriminatory impact on Incor's profoundly developmentally disabled clients. Incor's clients

receive state funding to help provide for their care and state supervision of their quality of care and training. Factors that unduly and disparately discriminate against these clients must not be allowed to determine what constitutes a "private home," especially when the outcome of applying those factors will likely result in an unjustified judicial classification of "institutionalization" of these most severely disabled.

Though the *Welding* factors may have been appropriate in deciding that particular case, the individual with more profound disabilities will find those same factors prove to be blatantly discriminatory against the most severely developmentally disabled.

The court of appeals in deciding this case narrowly considered each of the *Welding* factors. The first factor the court of appeals considered is "**whether the client lived in the living unit as his or her private home before beginning to receive the services.**" (App. A at A12-A13). This factor, however, does not consider those clients that have left institutions and moved into the community or those who have chosen to move from one residence to another. Indeed, many of the clients served by Incor moved out of institutions or nursing homes after obtaining agreements for in-home services to be provided by Incor or other provider agencies. Given the length of, and circumstances surrounding their institutionalization, returning to their pre-institutional residences was not an option for most. Additionally, if a potential client desires to move into another home and contract for Incor's

services, that factor would weigh against the private status of the client's new residence. Inexplicably, this factor unfairly restricts the client's freedom of moving from one residence to another without risking that the new residence will later be adjudged as "non-private," and subject the aged or infirm to exposure for back overtime wage claims and liquidated damages. Thus, the first *Welding* factor unreasonably weighs against the aged or infirm moving out of an institution or away from their family home in the private home analysis.

The second factor is "who owns the living unit." (App. A at A13-A14). In this case, most of Incor's developmentally disabled clients were not fortunate enough to live in a family owned or occupied residence. All of Incor's clients, and/or their guardians, rented their residence by signing leases with a landlord. Therefore, since the ultimate test of a "private home" is control, if a residence is leased by the client or guardian that fact should clearly weigh in favor of the residence being a "private home." The fact that the client and/or guardian determine where the client is going to live and execute the proper agreements to accomplish that should demonstrate absolute "control" of the residence. Taking into consideration "ownership," as opposed to "the right to control," unfairly discriminates against those individuals who were neither able to "own" their own home nor have their residence given to them.

The third factor considers "who manages and maintains the residence." (App. A at A15-A16). Of

course, in order to qualify for the exemption the individual must be unable to care for themselves, so it is axiomic that the recipients will need assistance with their residences. The court of appeals decision in this case wholly ignores the client and/or guardian's right to contract for that assistance from providers like Incor, and essentially insists that the individual residence be managed on a daily basis by a family member.

Due to the severity of the client's disabilities at issue in this case, these clients will *always* have to have someone else manage and maintain their residence. If it is not a family member who is managing and maintaining the home daily does that make the home any less "private" for the client? The Service Agreement which instructs the service provider to do what a family member may not be willing or able to do on a daily basis for the client should be given the foremost consideration in determining the client or guardian's control over the residence. Important to this case, the Service Agreements confirm the client's and/or guardian's ultimate responsibility with respect to home management yet the Tenth Circuit failed to give any consideration to the Service Agreements Incor has with its clients.

Thus, under the third factor, if the aged or infirm do not have a readily available family member able to manage the residence, their home is more likely non-private. This factor discriminates against those individuals with the most profound disabilities and handicaps that are unable to fully manage the residence. Sadly, as the

population ages in this country, fewer and fewer aged and infirm have family members willing and able to care for their daily needs.

The fourth factor considers "**whether the client would be allowed to live in the unit if the client were not contracting with the provider for services.**" (App. A at A16-A17). The court of appeals application of this factor is particularly troublesome to this case. If the client or guardian executes a lease agreement on a residence, of which Incor is not a party, why wouldn't the client be able to remain in the property if Incor is no longer providing the client services? The court of appeals has, however, saddled Incor with the responsibility of proving that the landlords would have rented to the client absent Incor's services. (App. A at A16-A17).

This is a contradictory factor. Incor bears the burden of proving that the residences are "private homes" which is demonstrated in part by the leases executed by the clients or their guardians. Yet the court of appeals suggests that Incor, who is not a party to the lease agreements and has no control over the leases, consult the landlords to affirmatively prove that the clients could have rented the residence whether they obtain services through a provider or not. (App. A at A16-A17).

Factor number five is most confusing and compares the "**relative difference in the cost/value of the services provided and the total cost of maintaining the living unit (including government subsidies).**" (App. A at A18-A20). This factor

compares the cost of the services the client receives against the cost of maintaining the home. If the cost of services is a "substantial portion" of the total cost of maintaining the living unit, it will weigh against the residence being a private home. Clearly, aged or infirm with more profound disabilities will require a greater level of care and the costs of those services will be exponentially greater. However, the costs of the services provided to those most profoundly disabled individuals has no bearing upon the parent or guardian's right to control the home. Indeed, the clients with more profound disabilities, who require more services, will always have a higher cost of care than someone who only requires care a few hours a day. Those clients who require care only a few hours a day will never need to use the exemption to the FLSA because it will be unlikely any one care provider will work in the home more than forty hours in a given week. Likewise, if a client with profound disabilities chooses to rent an affordable residence or live with a roommate to save on costs, this factor will again categorize the home as not being private.

This factor clearly discriminates against individuals with more profound disabilities due to the higher costs of their care. Further, the cost/value factor bears no discernable relationship to the control of the residence.

And finally, the sixth factor looks at "whether the service provider uses any part of the residence for the provider's own business purposes." (App. A at A20). Again, due to the level

of disabilities and care required of the clients in this case, there must be proper documentation and recordation of client's treatment and training. This requires paperwork to be filled out by the provider for the care of the client. All of the paperwork in the client's residence related to their care (i.e., medical records, progress notes, activity logs) and was kept in their home with their permission. Indeed, those necessary client records were the property of the individuals and would remain with the client should the client move or change providers. Whether or not the service provider keeps any required paperwork or uses any part of the home to complete that paperwork can be addressed and controlled through the Service Agreement by the client and/or their guardian.

The six "private home" factors as set out in *Welding*, discriminate against the more profoundly developmentally disabled because they fail to account for the individual needs and requirements of caring for such individuals. Severely disabled individuals will never reside in a "private home," and in turn may never utilize the very exemption designed to assist them in obtaining such services. In categorizing these aged or infirm individuals in this way, the Tenth Circuit is relegating the severely disabled as being perpetually categorized as institutionalized, no matter where they reside. Such perpetual institutionalization, this Supreme Court has held, is discrimination. *See Olmstead v. L.C.*, 527 U.S. 581, 119 S. Ct. 2176, 144 L.Ed. 2d 540 (1999). Most significantly, as discussed in depth above, under the cost/value factor, the more

services the client requires, the more funding that will be required to care for the client. Thus, the purpose of the exemption is undermined by excluding the home as "private" due to the fact that the resident's cost of care will be a "substantial portion of the total cost of maintaining the living unit." *Welding*, 353 F.3d at 1220. Likewise, the management and maintenance of the residence factor (factor three) lends itself to always finding that the more severely disabled the client, the more likely the home will not be private in instances where a family member is not ready, willing and able to manage the residence on a daily basis. Clients such as Incor's cannot personally maintain their homes and that is precisely the purpose of providing for the highest level of care and training for these individuals. Absent this level of care, the only option is institutionalization or sub-standard services.

Under the current factors applied by the Tenth Circuit, the only clients that will be able to meet the "private home" standard will be ones that are living in a home that they personally owned prior to needing Incor's services. Someone with such severe disabilities as the clients in this case will not have the ability to own their own home. However, even if the home was owned by the client, or if the client was living with a family member, application of the other *Welding* factors could easily strip that residence of its private nature due to application of the other factors. Discrimination against the most severely disabled is surely not what Congress had in mind when enacting the

exemption for "Companionship Services" under the FLSA or in enacting the ADA.

In sum, these issues present questions that need to be finally settled by this Court, warranting granting this petition for writ of certiorari.

3) **The United States Court of Appeals for the Tenth Circuit has interpreted a federal regulation in a way that frustrates the purpose of relevant decisions of the United States Supreme Court.**

The court of appeal's decision at issue in this case frustrates the purpose of this Court's recent decision in *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339 (2007), and the ability of third party employers to use and rely upon the Companionship Services exception to the FLSA. In *Coke*, this court upheld the validity of the third party exemption contained in 29 C.F.R. § 552.109(a). The Tenth Circuit's decision in this case, and application of the *Welding* factors, has made the burden of demonstrating the "private home" status under the exemption a hyper-technical gauntlet. The expansion of the exemption to third party employers will not be available under the Tenth Circuit's current analysis, or it will be so uncertain as to prevent employers from utilizing it, thus effectively rendering it useless. The court of appeals in this case has in effect invalidated the very regulation that this Court sought to expand in *Coke*.

The costs of not allowing this exception to be used by third party employers to care for a significant population, include; 1) increased cost of care, putting a financial burden on the aged, infirm, their families, state and federal government, and/or the service provider, 2) reduction in services which will risk improper care of the clients, 3) or institutionalization.

The problem created by the court of appeal's effectual invalidation of § 552.109(a) reaches far "beyond the academic or episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Provider agencies inability to use this exception will have a dramatic impact on home health care costs throughout the Tenth Circuit, and it will force largely government-funded agencies to restructure their business operations in ways that will seriously harm both the care recipients and the employees. Employers will limit the number of hours their employees work each week, affecting the overall care that the client receives and the amount of pay and benefits the employee receives.

Further, the added strain on governmental budgets due to employers not utilizing this exception will upset the home health care balance of the desire to give patients an alternative to institutionalization yet still provide an affordable and safe option for health care. Many disabled will be forced into institutionalization if third party employers can no longer assure adequate and safe services at an affordable cost.

Due to the uncertainty in the application of the *Welding* factors, and this Court's recent

pronouncement of the validity of the third party employer exception, final interpretation of this issue warrants granting this petition for writ of certiorari.

CONCLUSION

The petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit should be granted.

Respectfully Submitted,

Adam Scott Weintraub
Counsel of Record
Terry S. O'Donnell
Savage, O'Donnell, Affeldt,
Weintraub & Johnson
110 W. 7th Street, Suite 1010
Tulsa, OK 74119
(918) 599-8400
Attorneys for Petitioners

Dated: August 28, 2008